FILE COPY

Office - Supreme Court, U. S.
FILED
APR 15 1950
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 754

THE EMERY TRANSPORTATION COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

STATEMENT AS TO JURISDICTION

Underwood D. Todd,
Dale O. Dillon,
Harry Kasper,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions	1
Date of the decree sought to be reviewed and the date upon which the application for appeal was presented	2
Nature of the cause and of the rulings below	2
Cases sustaining the Supreme Court's jurisdiction on appeal	3
Decree of the highest court	3

Table of Cases Cited

Cornell Steamboat v. *United States*, 321 U. S. 634	3
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	3
Schenley Distillers Corporation v. *United States*, 5 F. Supp. 491	3

Statutes Cited

United States Code, Title 28:	
Section 41(28)	1
Section 44	1
Section 45	1
Section 46	1
Section 47	1
Section 47(a)	1
Section 845	1
United States Code, Title 49:	
Section 17(9)	1

BLEED THROUGH POOR COPY

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 2164

THE EMERY TRANSPORTATION COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,

and

INTERSTATE COMMERCE COMMISSION,
Intervening Defendant

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The Emery Transportation Company presents the following statement as the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final decree of February 14, 1950, in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction of the Supreme Court are:

U. S. Code, Title 49, Section 17(9); U. S. Code, Title 28, Sections 41(28), 44, 45, 46, 47, 47(a), and 845.

B. Date of the Decree Sought to Be Reviewed and the date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered February 14, 1950. The petition for appeal, together with the assignment of errors, was presented and allowed March 8th, 1950.

C. Nature of the Cause and of the Rulings Below

This is an appeal from the District Court of the United States for the Southern District of Ohio, Western Division, dated February 14, 1950, dismissing the petition of the plaintiff in which said petition it was prayed that the District Court annul, set aside and enjoin enforcement of an order of the Interstate Commerce Commission dated March 14, 1949, as described in and made a part of the complaint to the District Court.

This action arose as a result of the Commission's suspending, pursuant to the provisions of Title 49, Section 318, of the United States Code, a schedule of minimum rates and charges filed by plaintiff designated as Supplement No. 1 to its MF-I. C. C. No. 97 to become effective on March 29, 1948, a copy of which was attached to the complaint filed with the District Court. A public hearing was held pursuant to an order of the Commission and thereafter a hearing examiner rendered a report and recommended order to the effect that plaintiff was proposing to establish new reduced contract carrier minimum rates which would result in tacking two separately authorized contract carrier rights, thereby attempting to render through transportation service under so-called proportional minimum rates for such through service and that such proposal was unlawful. The

BLEED THROUGH POOR COPY

hearing examiner recommended that plaintiff be required to cancel the aforementioned schedule. A copy of the report and recommended order of the examiner was attached to the complaint.

Exceptions were taken to the recommended report of the examiner, and Division 2 of the Commission, in a report and order dated March 14, 1949, found the proposed schedules unlawful in that they contained new or reduced charges for transportation which was without the scope of plaintiff's operating rights. A copy of the report and order of Division 2 was attached to the complaint.

Plaintiff filed a petition for reconsideration which was denied by the Commission by order dated July 6, 1949. A copy of such denial order was attached to the complaint.

D. Cases Sustaining the Supreme Court's Jurisdiction on Appeal

Rochester Telephone Corp. v. *United States,* 307 U. S. 125;

Cornell Steamboat v. *United States,* 321 U. S. 634;

Schenley Distillers Corporation v. *United States,* 5 F. Supp. 491 (1943).

E. Decree of the District Court

The United States District Court for the Southern District of Ohio, Western Division, by a decree signed by United States Circuit Judge Florence E. Allen, and United States District Judges Nell G. Underwood and John H. Druffel, determined that the action of the Interstate Commerce Commission was reviewable by statutory court but that the order of the Commission requiring plaintiff to cancel the proposed schedule of rates and charges is a

legal and valid order that, therefore, the injunction sought should be denied and the suit dismissed.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

Dated March 8, 1950.

CLARENCE D. TODD,
DALE C. DILLON,
HARRY KASFIR,
Counsel for Appellant.

(7816)

FILE COPY

Office - Supreme Court, U.
FILED
APR 18 1950
CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1949.

No. 754.

THE EMERY TRANSPORTATION COMPANY, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees*.

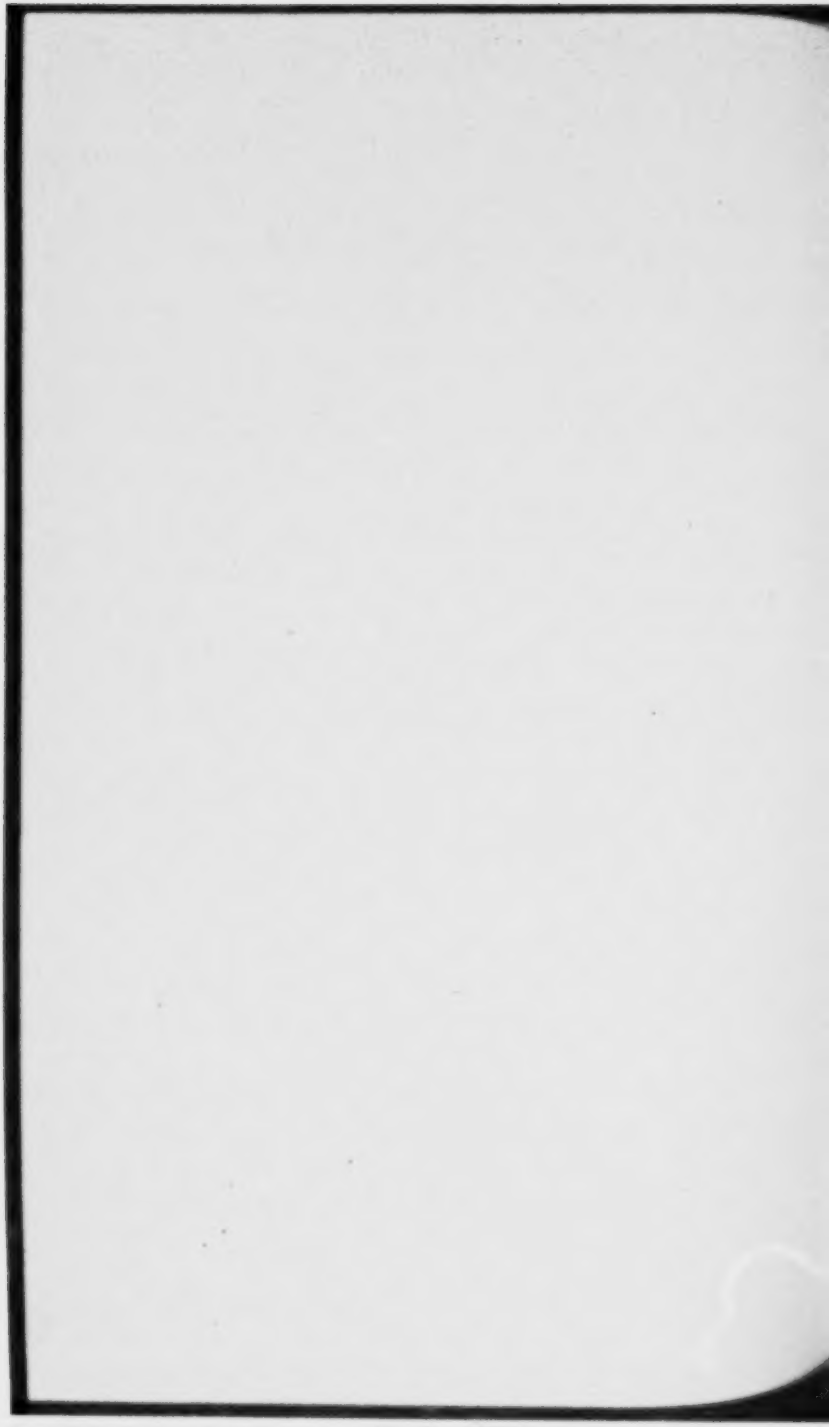
REPLY TO MOTION TO AFFIRM.

CLARENCE D. TODD,
DALE C. DILLON,
944 Washington Bldg.,
Washington 5, D. C.

HARRY KASFIR,
405 Fountain Square Building,
Cincinnati 2, Ohio,
Attorneys for Appellant.

TODD, DILLON & CURTISS,
Of Counsel,
944 Washington Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



BLEED THROUGH

POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1949.

No. 754.

THE EMERY TRANSPORTATION COMPANY, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*

REPLY TO MOTION TO AFFIRM.

This is the reply of the Emery Transportation Company, plaintiff-appellant, hereinafter referred to as Appellant, to the motion to affirm filed by the United States of America and the Interstate Commerce Commission, defendants-appellees, hereinafter referred to as Appellees, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States.

The statement of the case, as set forth by Appellees on pages 1 and 2 of their Motion, appears to be substantially correct. However, it omits one fact which is of extreme importance in the final adjudication of this cause. Appellees, in their Motion to Affirm, point out that Appellant purchased the operating rights here under consideration, from Jeffersonville, Ind. to Chicago, Ill., from the Nowak Trucking Company, and that such purchase was authorized by the

Commission in *Emery Transportation Co.—Purchase—Nowak Trucking Co.*, 40 M. C. C. 845 and 45 M. C. C. 805. It is also pointed out by Appellees that Appellant purchased the operating rights from Chicago, Ill. to points and places in Wisconsin from the Midwest Transfer Company of Illinois, and that such purchase was authorized by the Commission in *Emery Transportation Co.—Control and Merger*, 50 M. C. C. 433, but Appellees did not point out to the Court that the Commission in approving the purchase of the operating rights from the Midwest Transfer Company of Illinois, specifically permitted and authorized Appellant to unify these rights with those already confirmed in it, and that the rights already confirmed in it were those which were previously purchased from the Nowak Trucking Company. The Commission, in approving the transaction stated that: ". . ., the Emery Transportation Company will be entitled to a permit covering the described portion of the operating rights granted in No. MC-107640 (those purchased from Midwest) which rights are herein authorized to be unified with rights otherwise confirmed in it, with duplications eliminated." (See page 8 of Appendix B attached to the Complaint.)

Appellees contend that this appeal presents no substantial questions; that the only issue "presented is whether a contract carrier possessing separate operating rights can without obtaining specific operating authority therefor combine the same so as to render through service between the origin point on one route and the destination points on the other."

Appellant respectfully submits that there are substantial questions involved in this appeal and, further, that Appellees have misstated the issue which is presented to the Court. The statement of the issue as presented by Appellees presupposes that Appellant has two separate operating permits which it acquired without knowledge of the Interstate Commerce Commission or without the Commission ever having had an opportunity to approve or disapprove

BLEED THROUGH POOR COPY

the acquisition of such permits. These two suppositions are entirely erroneous. Appellant has but one permit, which includes the authorities here under consideration, as well as others. Prior to the time it purchased either one of the authorities involved in this case, it filed an application with the Interstate Commerce Commission for approval of the transaction. These applications were set down for public hearings, after which and as a result of the factual records made at such hearings, the Commission found it consistent with the public interest for Appellant to purchase these rights and consistent with the public interest for Appellant to unify these rights with those already confirmed in it. The issue before the Court, therefore, is not whether a contract carrier possessing separate operating rights can combine the same so as to render through service, but whether Appellant, who has been authorized to unify operating rights authorizing transportation services from Jeffersonville, Ind. to Chicago, Ill., and from Chicago, Ill. to points in Wisconsin, may consider such rights as one and unite the same for the purpose of performing a service from Jeffersonville, Ind. through Chicago, Ill. to points in Wisconsin, upon the basis of rates which it has proposed. To decide this issue, it would seem that it would be necessary to ascertain what Appellant was permitted to do when the Commission authorized it to unify the rights purchased from Midwest with those which it had previously purchased from Nowak, and to determine whether once the Commission in a case has permitted the unification of operating rights, it can, in a subsequent case, prohibit the combination or combining of the rights which it has already authorized to be unified.

Appellees attempted, in their reply brief filed with the Lower Court, to ascribe a special or particular meaning to the words "to be unified" by attaching to such brief a memorandum from the Bureau of Motor Carriers to the Chief Counsel of the Interstate Commerce Commission, wherein the Director attempted to given an interpretation

of what the members of the Interstate Commerce Commission meant by the use of this term. There is nothing in the Interstate Commerce Act which indicates that the verb "unify" is to be given an unusual meaning nor in the transportation industry does it have any special significance so as to be considered a word of art. The word, therefore, should be given the common or ordinary meaning usually ascribed to it. *A. Magnano Company* v. *Hamilton, Atty. Gen., et al,* 292 U. S. For the ordinary meaning of the word we must refer to a standard dictionary. According to Webster's New International Dictionary, the word "unify" means to "cause to be one or uniform; to make into a unit; to unite; to view as one." "Unify" is derived from the Latin "unus," meaning "one," and "facere," meaning "to make." An accurate interpretation, therefore, of the Latin root of the word would be "to make one," which is one of the definitions used by Webster. The ordinary meaning to ascribe to the word "unify" would seem to be "to make one" or "to unite." The term "to be unified," therefore, would seem to mean "to be made one" or "to be united." Accordingly, the Commission, when it authorized Appellant to purchase the operating rights of Midwest, not only approved the transaction but authorized Appellant to make or use the rights as one, or to unite them with other rights previously confirmed in it. The ordinary definition of the word "unify" is not a stranger to the Courts for in *Adams et al* v. *Salt River Valley Water Users' Assn.,* 89 Pac. (2nd) 1060, 1071, the Supreme Court of Arizona, considered a contract which contained this word. The contract had stated, "The object and purpose . . . is to provide and execute a general plan for unified operation". The Court quoted Webster as follows: "That unify means: 'To cause to be one; to make into a unit; to unite. . . . To become one; to consolidate.' And that unified means 'made one' ".

If Appellant has been permitted by the Commission to unite, or to make the operating rights in question one, there can be little doubt but that the Commission, in the purchase

BLEED THROUGH POOR COPY

transaction, authorized the performance of transportation services from Jeffersonville through Chicago to points in places in Wisconsin. Appellees undoubtedly recognized this fact for, in presenting to the Court their idea of the issues involved in the case, they were very careful to point out that the contract carrier in question had two separate operating rights. If we are to give any meaning whatsoever to that portion of the Commission's Order permitting the unification of the operating rights, we cannot consider that the rights here in question are separate one from the other.

Appellees, in stating the issue of the case, indicate that the question before the Court is whether Appellant may combine the operating rights in question. If it is admitted that the Commission has already authorized these rights to be unified, and it would seem that such an admission is inescapable, it must also be concluded that the Commission has authorized that these rights be combined, for the two words "unify" and "combine" mean exactly the same thing. Webster's New International Dictionary defines the word "combine" to mean "to unite or join." As previously indicated, the same dictionary defines "unify" to mean "unite." It would seem, therefore, that if the Commission has authorized the operating rights here in question to be unified, it has also authorized these rights to be combined. The question, therefore, is not whether Appellant may unify or combine these operating rights, but whether the Commission, after authorizing such action, may, in a subsequent case, where Appellant is attempting to do that which the Commission has authorized, may find the action to be unlawful.

The Commission, by authorizing that the rights here in question be unified or made as one, authorized the performance of a through transportation service from Jeffersonville, Ind. through Chicago to points in Wisconsin. Its Order in the instant case, finding rates providing for this service to be unlawful because they exceed the scope of the operating permit, amounts to a taking of property with-

out due process of law, contrary to the provisions of the Constitution.

The instant case presents to the Court the same legal questions which are involved in the *Texas and Pacific Motor Transport Company* v. *United States of America and Interstate Commerce Commission*, 87 Fed. Supp. 107, and the *Rock Island Motor Transit Company* v. *United States of America and Interstate Commerce Commission*, Decided November 29, 1949, U. S. Dist. Court, Northern District of Illinois, Eastern Division (7 Federal Carrier Cases 80,573 CCH), not yet printed in the Federal Reporter System. In both of these cases, the plaintiffs were subsidiaries of railroads engaged in transporting property by motor vehicle. They had both purchased certain certificates of public convenience and necessity from others, pursuant to approval received from the Interstate Commerce Commission. Subsequent to the approval, the Commission attempted to impose on the certificates held by the carriers certain conditions, one of which was the so-called "keypoint restriction" which would prohibit the carriers from transporting property through or between certain points authorized to be served by their certificates. Rock Island Motor Transit Co., for example, had purchased a certificate which authorized services over routes between Chicago, Ill. and Omaha, Neb. It had also purchased another certificate which authorized services over a route in western Iowa extending to Omaha, Neb. The condition which the Commission attempted to impose would have prohibited Rock Island from performing through services between certain key points, such as Omaha, Neb.; Des Moines, Iowa; Davenport and Bettendorf, Iowa; and Rock Island and Moline, Ill. While in the instant case, the Commission has not attempted to impose a keypoint restriction, the effect of this Order finding the rates proposed to be unlawful because they are beyond the scope of the operating rights, has the effect of prohibiting Appellant from transporting property through Chicago, Ill., thus establishing, for all practical

BLEED THROUGH POOR COPY

purposes, Chicago as a keypoint. Both the Texas and Pacific Motor Transport Co. and the Rock Island Motor Transit Co. applied to the Courts for injunctive relief from the Orders of the Interstate Commerce Commission imposing such conditions and, in both instances, the injunctive relief was granted.

The Court, in the *Texas and Pacific case,* supra, stated, in part, as follows:

> "(b) The last question is whether, after having permitted the acquisition of these certificates, the Commission may issue orders which stifle and, in reality, destroy the value of such certificates. No one learned in the law could permit an affirmative answer to that question. It is a taking of private property without due process.
>
> ". . . nor can revocation be accomplished in any way except under Section 212. It cannot be brought about by the imposition of terms and conditions, or limitations. The Commission itself, said in *Quaker City Bus Co.—Purchase—Black Hawk Lines,* 38 M. C. C. 603, that 'the existence of a certificate creates a vested motor carrier status which stays in force and effect . . . until that certificate is revoked in accordance with the procedure described in Section 212(a).'
>
> "If we give the Commission power to revoke, by terms, limitations, and conditions, by an attempted stretch of Section 208(a), then we make Section 212(a) utterly useless. Each section has its purpose. Each section expresses the intent of Congress. Such intent must govern."

While in the instant case Appellant's operating right is a permit rather than a certificate, such permits are recognized in the law governing motor carriers and are a valuable property right the same as certificates of public convenience and necessity; and while, in the instant case, the Commission has not attempted to impose a restriction in the operating permit, itself, its Order finding the rates proposed to be unlawful is just as effective as a partial revoca-

tion of the permit as would be such a limitation or restriction. The Order of the Commission, therefore, stifles and in reality destroys the value of the permit. It is, therefore, as was found in the *Texas and Pacific case,* supra, a taking of private property without due process. "It is confiscation. It is destruction. It is arbitrary." Furthermore, the Commission in this instance, by stretching the powers granted to it by Congress under Section 218 of the Act is making utterly useless the provisions in Section 212(a) and is, therefore, acting directly contrary to the express intent of the Congress.

The Court, in granting the injunctive relief sought in the *Rock Island case,* said:

> "It is apparent that the proceedings covered by the Order of April 11, 1941 (those which imposed the conditions) were reopened to execute a new policy as expressed in the *Texas and Pacific case,* and that the Commission failed to observe these recognized limitations, whereas here, the action of the Commission in the reopened proceedings results in a material change in plaintiff's certificates and operating rights, and a revocation in whole or in part of such certificates and operating rights, the Commission's power so to act must be clearly evident from the statute. *I. C. C.* v. *Seatrain Lines,* 329 U. S. 424; *United States* v. *Pennsylvania R. Co.,* 242 U. S. 208; *I. C. C.* v. *C. N. O. and T. P. R. Y. Co.,* 167 U. S. 479. No such power is apparent from this record and this is not a proceeding under Section 212 of the Interstate Commerce Act."

What the Commission is here attempting to do is to impose a condition upon Appellant's right to purchase which was not imposed in its original Order. This is apparent from a recent decision of the Commission authorizing Appellant to purchase other operating rights. In *Milton Ratner and Bernard A. Lipson—Control; The Emery Transportation Company—Purchase (Portion)—C. J. Davis,* Docket No. MC-F-4227 (January 26, 1950), Not Printed, the Commission stated:

BLEED THROUGH POOR COPY

". . . Nothing herein contained is to be construed as authorizing any enlargement of the existing rights, or as authorizing vendee to render through single-line service through a combination of its present rights with those acquired . . ."

This language was not included in the Report and Orders of the Commission approving the purchases by Appellant of the operating rights of Nowak Trucking Company and Midwest Transfer Company of Illinois. The Commission in the instant case, is attempting to give effect to this policy as expressed above. In so doing, it is making a material change in Appellant's permit and operating rights and a partial revocation of such rights. There is nothing in the Interstate Commerce Act, Part II, which gives the Commission the power to so partially revoke Appellant's permit. For this reason, the Commission's Order violates the Fifth Amendment to the United States Constitution.

Appellees, in their Motion to Affirm fail to make a proper statement of the issues before the Court. However, even if we accept the issue as stated by appellees, it is quite apparent that there are involved substantial questions which should be reviewed by the Supreme Court of the United States.

In support of their argument that there are no substantial questions involved in the instant case, Appellees propose that the Commission in *Service of Contract Carriers*, 49 M. C. C. 103, held that a contract carrier cannot combine together operating rights purchased with those already held for the purpose of performing a through transportation service over such rights. In arriving at this conclusion, it was necessary for the Commission to make a judicial interpretation of certain sections of the Interstate Commerce Act. The interpretation and application of the law made by the Commission in *Services of Contract Carriers*, supra, has never been reviewed by the Courts. Accordingly, the issue here involved is a novel one involving substantial questions and should be the subject of judicial review.

The very fact that the Commission attempts to use its decision in *Services of Contract Carriers* as authority for holding the rates involved in the instant case to be unlawful, raises a substantial question of law. The decision of the Commission in *Services of Contract Carriers*, supra, was made as a result of a petition filed with the Interstate Commerce Commission in which the Contract Carrier Conference of the American Trucking Associations, Inc. was the petitioner and requested the Commission to make a general rule covering this subject, pursuant to the provisions of Section IV(b) of the Administrative Procedure Act, which section outlines the procedure which is to be followed by administrative bodies, including the Interstate Commerce Commission, in making general rules applicable to persons subject to regulation. The Commission denied the petition and refused to establish a general rule pursuant to the Administrative Procedure Act, upon the basis that the question had already been decided in individual cases before the Commission.

Had the Commission, in the application of Appellant to purchase the operating rights of Midwest, imposed a restriction against using the unified rights for the purpose of performing a through transportation service and cited, as authority for so doing, other cases wherein the same restriction had been imposed, the question before the court would have been limited solely to the issue whether the Commission, under the Interstate Commerce Act, has authority to impose such a condition or restriction. If the Commission had established in *Service of Contract Carriers* a general rule pursuant to the provisions of the Administrative Procedure Act and then in the instant case attempted to apply that rule to the rights purchased by Appellant, the issue before the Court would simply have been whether a general rule of this kind could have been given retroactive effect, but the Commission did not take either course of action. It imposed no condition or restriction in Appellant's right to purchase the authority of Midwest and it has not estab-

BLEED THROUGH POOR COPY

lished a general rule pursuant to the provisions of the Administrative Procedure Act, but has attempted to give previous decisions in individual cases the dignity of a general rule applicable to all contract carriers. In the instant case, therefore, the question is raised as to whether the Interstate Commerce Commission, in establishing general rules, must follow the provisions of the Administrative Procedure Act or whether it may establish such rules in any individual case which comes before it.

Appellees also contend that there are no substantial questions involved in the issue presented by the case because in *Noble* v. *United States*, 319 U. S. 88, the Court held that the Commission, pursuant to its authority to specify in a permit "the business of the contract carrier covered thereby and the scope thereof," gives it the power to describe "the exact and precise character of the service to be rendered." While it may be that, under the authority of the *Noble* case, supra, the Commission may describe in a permit "the exact and precise character of the service to be rendered," it does not follow that if the Commission does not impose in one of its Orders any restrictions on the right of a contract carrier to buy operating rights of another contract carrier, that it may, in a subsequent case, find a proposed operation to be unlawful on the basis that it would have been had it imposed such a condition in the original grant of authority. In short, in the instant case the Court has before it the legal question as to whether the Commission may impose a restriction which it is here attempting to do, when it has not put the restriction in either the Order authorizing the purchase of the rights, or in the permit which was issued after the purchase was consummated, and has not promulgated any general rule governing the situation.

Appellees, in further support of their contention that there are no substantial questions involved in the issues presented to the Court, point out that in *Acme Fast Freight* v. *U. S.*, 309 U. S. 638, this Court affirmed a decision of a District Court which held, in effect, that Section 216 (c) of

the Act (49 U. S. C. 316 (c)) applies only to common carriers. *Acme Fast Freight* v. *U. S.*, 30 F. Supp. 968, 973. In the *Acme case*, supra, the question before the Court was whether Freight Forwarders who were not regulated as carriers could enter into joint rates and through routes with common carriers by motor vehicle. This issue is not presented to the Court in the instant case. However, the Commission, in *Services of Contract Carriers*, supra, did make mention of the fact that the Interstate Commerce Act is silent with respect to the right of contract carriers to enter into joint rates or through rates. While this is true, does the silence of the Act on this question imply that contract carriers may not enter into joint rates or through routes one with another? Here again is another substantial question which must be decided in connection with the issue which Appellees contend is before the Court in the instant case. Under the common law, a contract carrier or private carrier for hire could do anything that a common carrier could do, except hold out to serve the general public. Undoubtedly, prior to the passage of the Motor Carrier Act, two contract carriers could perform a through service under joint or multiple rates, if they so desired. As previously stated, there is nothing in the Interstate Commerce Act which prohibits contract carriers from continuing to do the same thing. Appellees take the position that the silence of the Act on this point amounts to a prohibition. This, of course, is contrary to all rules of statutory construction, for the repeal or diminishing of common law rights is never to be accomplished by implication but only by clear or unambiguous statutory language. See *McCarthy* v. *McCarthy*, 20 App. D. C. 195; *Tinker* v. *Modern Brotherhood of America*, 13 F. 2nd 130. See also *Sutherland—Statutory Construction*, Sections 6201 and 6206.

As their final argument that the instant case presents no substantial questions of law, Appellees cite the *United States* v. *Rosenbaum Truck Lines, Inc.*, 315 U. S. 50, and quote therefrom a statement of this Court which says, in

BLEED THROUGH POOR COPY

effect, that problems of statutory construction must be decided on the intention of the enacting body and that Congress intended for common carriers to obtain certificates of public convenience and necessity from the Interstate Commerce Commission, and contract carriers, permits from the same body. Appellants do not contend in this action that they need not have a permit from the Interstate Commerce Commission in order to perform the services in the rate schedule involved in this case. Its contention is that it does have a permit which authorizes this transportation service. It is the contention of Appellees that the permit held by Appellant does not authorize these services. It is up to this Court to determine whether Appellant may perform the services provided for in the rates which the Commission found unlawful under the authority which it purchased from Nowak Trucking Company and Midwest Transfer Company which the Commission authorized it to unify into one operating permit.

The instant case is of extreme importance to Appellant because it is presently handling traffic from Jeffersonville through Chicago to points in Wisconsin and such business is very profitable. For it to have to forego this particular operation would mean the loss of very substantial revenues to its business and would, in a large part, destroy the value of the operating rights which it has purchased. The issue that is here presented to the Court involves several very substantial legal questions. In fact, the entire controversy revolves around an interpretation of the statute. While the Lower Court issued a judgment and decree, it did not issue an opinion in this matter. For this reason, there has been no authoritative judicial interpretation.

Conclusion.

The Interstate Commerce Commission, having specifically permitted and authorized appellant to unify the operating authority herein under consideration, the issue to be decided is whether, having done so, the Commission in

another proceeding can prohibit the combining of the operating rights. Appellant respectfully represents that such action on the part of the Interstate Commerce Commission is not lawful because:

1. The words "unify" and "combine" are synonomous, both in fact and law.

2. A permit granted to a contract carrier constitutes a valuable property right of the same nature as a Certificate of Public Convenience and Necessity.

3. Having once authorized a unification, the action of the Commission in prohibiting performance of through transportation under a permit amounts to a taking of property without due process of law.

4. Had the Interstate Commerce Commission intended at the time the permit was granted that through transportation was not to be performed over this authority, the language of the grant of authority would have specifically excluded such through transportation as is consistently done when the Commission so intends.

BLEED THROUGH POOR COPY

The appeal thus presenting substantial questions, it is, therefore, respectfully submitted that the Motion to Affirm should be denied.

Dated April 18, 1950.

CLARENCE D. TODD,
DALE C. DILLON,
944 Washington Bldg.,
Washington 5, D. C.

HARRY KASFIR,
405 Fountain Square Building,
Cincinnati 2, Ohio,
Attorneys for Appellant.

TODD, DILLON & CURTISS,
Of Counsel,
944 Washington Building,
Washington, D. C.

Certificate of Service.

I certify that a copy of the foregoing reply to the Motion of Appellees to Affirm, was served on counsel of all parties of record by mail this 18th day of April, 1950.

CLARENCE D. TODD.

In the United States District Court for the Southern District of Ohio, Western Division

Civil Action No. 2164

THE EMERY TRANSPORTATION COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed. This is a direct appeal from the final judgment and decree, entered on February 14, 1950,[1] by a specially constituted district court of three judges established pursuant to Section 2284, Title 28 of the United States Code, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on March 8, 1950, and appeal papers were served on March 8, 1950.

[1] The Court entered no opinion but made and entered Findings of Fact and Conclusions of Law on February 14, 1950.

The Commission's order dated July 6, 1949 required appellant to cancel a proposed schedule of minimum truck-load rates on specific commodities from Jeffersonville, Indiana, to Chicago, Illinois, and from Chicago to specific destinations in Wisconsin. By these rates filed pursuant to Section 218 of the Interstate Commerce Act (49 U. S. C. 318), appellant proposed to establish new reduced contract carrier minimum charges for the transportation of soap, soap powders and toilet articles on routes between the above-described points.

Appellant is a contract carrier holding permits issued pursuant to Section 209 of the Act (49 U. S. C. 309) authorizing it to operate as a motor contract carrier over irregular routes in the transportation of (1) soap, soap powders and toilet articles from Jeffersonville, Indiana, to Chicago, Illinois, and (2) such merchandise as is dealt in by wholesale food business houses from Chicago to all points in Wisconsin. These separate operating rights, among others, were acquired by the appellant through separate purchases authorized in Commission proceedings entitled *Emery Transportation Co.—Purchase—Nowak Trucking Co.*, 40 M. C. C. 835 and 45 M. C. C. 805, and *Emery Transportation Co.—Control and Merger*, 50 M. C. C. 43.

On March 14, 1949 Division 2 of the Commission filed its report [2] and order in which it found that the proposed schedule of minimum rates were

[2] 49 M. C. C. 176.

BLEED THROUGH POOR COPY

proportional rates[3] designed to apply on through shipments from Jeffersonville, Indiana, to destinations at points in Wisconsin and as such were applicable to transportation in excess and beyond the scope of appellant's operating rights.

Appellees submit that this appeal presents no substantial questions. The issue presented is whether a contract carrier possessing separate operating rights can without obtaining specific operating authority therefor[4] combine the same so as to render through service between the origin point on one route and the destination points on the other. If such action by the contract carrier is not recognized or permitted by the provisions of the Act, the schedule of rates applicable to such

[3] The Commission found:

The proposed minimum rates would apply only on through shipments from Jeffersonville to the destinations in Wisconsin. Although separate contracts are entered into between the respondents and the shipper for the transportation to Chicago and beyond Chicago, the shipments are not rehandled at Chicago. They move through to destinations in the same vehicle. It is the intention of the shipper that its shipment shall move through to the destinations in Wisconsin when they leave Jeffersonville. (49 M. C. C. 176, 177.)

The proposed minimum rates are proportional rates. They are factors of through rates which are intended to apply on traffic on which through service would be performed. (49 M. C. C. 176, 180.)

[4] As stated on page 45 of the transcript of argument before the Commission, there was pending before the Commission but undecided at that time an application filed by appellant seeking a permit authorizing it to perform the through service covered by the rates here involved.

through service was properly rejected by the Commission.

Decisive of the matter here presented is the fact that Section 209 of the Act (49 U. S. C. 309) prohibits the performance of interstate commerce by a contract carrier unless such carrier has first obtained from the Commission a permit evidencing the authority to conduct the particular type of operation it intends to perform. Subsection (b) of said Section 209 requires the Commission to "specify in the permit the business of the contract carrier covered thereby and the scope thereof * * *."

The Commission has consistently held that a contract carrier cannot, without specific authority therefor granted in its permit, combine or "tack" (the term generally used) operating rights or routes and render through service between points described in its separate operating rights.

In its most recent restatement of this doctrine, *Service of Contract Carriers,* 49 M. C. C. 103, 105–6, the Commission said:

> Ordinarily the question of "tacking" of operating rights is not involved in applications filed under section 209 of the act, because applicants for contract-carrier authority have almost without exception sought authority to perform a complete service for the shipper without regard to their existing authority. In those few instances where this was not done, division 5 has consistently adhered to the policy that

BLEED THROUGH POOR COPY

a contract carrier could not "tack" new routes or rights to existing authority. The leading case on this question is ***Longshore Extension—Salem—Youngstown, Ohio,*** 43 M. C. C. 755, wherein that division said at pages 758 and 759:

No provision is made in the act for the establishment by contract carriers of through routes or joint rates with other such carriers or with common carriers, or for a single contract carrier to render through service between points specified in separate authorities held by it. Compare *Chicago and Wisconsin Points Proportional Rates,* 17 M. C. C. 573, 577. On the contrary, the act contemplates that the service of a contract carrier, under a permit held by it, shall be as specified in an individual contract or agreement with the shipper. Such service therefore would seem to be inconsistent with the establishment of through routes or joint rates with other carriers, or with performance by a single carrier of through service under two or more separately granted permits. Section 209 (b) of the act provides, in part, that we shall specify in the permit "the business of the contract carrier covered thereby and the scope thereof." This phrase is all-inclusive and connotes in addition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier. *Keystone Transp. Co. Contract Carrier Application,* 19 M. C. C. 475, 493. In other

> words, we consider that each permit granted by us should describe fully the particular service to be performed for otherwise the permit would not specify "the exact and precise character of the service to be rendered." * * * For example, if a contract carrier were issued a permit to operate from A to B and later was issued a permit to operate from B to C, the two authorities granted would not enable the carrier to provide service from A through B to C. Nor has a contract carrier holding a permit to operate [,] to use the same illustration, from A to B and which acquires, under section 5 or 212 (b) of the act, the contract-carrier authority of another carrier operating, from B to C, been allowed to join the connecting contract-carrier rights so as to render through service. See *Clare M. Marshall, Inc., Purchase—Cunningham,* 36 M. C. C. 507, *Marion Trucking Co., Inc.—Purchase—Martz,* 37 M. C. C. 305.

In *Noble* v. *United States,* 319 U. S. 88, 92–93, the Court agreed with the views of the Commission as expressed in the *Keystone* report, *supra,* that the provision in Section 209 (b) requiring the Commission to specify in the permit "the business of the contract carrier covered thereby and scope thereof," meant that the terms of the permit should describe "the exact and precise character of the service to be rendered," and held that the performance of a greater or different

BLEED THROUGH POOR COPY

type of service would have to be the subject of an additional grant of authority by the Commission.

Whereas, Section 216 (c) of the Act (49 U. S. C. 316 (c)) provides that common carriers of property by motor vehicle may establish through routes and joint rates, similar authority has not been granted to contract carriers by the Act, which is silent with respect to them. In *Acme Fast Freight* v. *United States*, 309 U. S. 638, this Court affirmed a decision of a District Court holding that the provisions of that section, applying only to common carriers, were exclusive. *Acme Fast Freight* v. *United States*, 30 F. Supp. 968, 973.

As this Court said in *United States* v. *Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 53:

> The question here, as in any problem of statutory construction, is the intention of the enacting body. Congress has set that forth for us broadly in the declaration of policy—in essence it is the regulation of transportation by motor carriers in the public interest so as to achieve adequate, efficient, and economical service. To implement that policy Congress forbade common carriers by motor to operate in interstate commerce without securing a certificate of public convenience and necessity from the Commission, and required contract carriers to secure a permit from that body.

The decisions of this Court support the Commission's consistent interpretation of the statute, and the appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

ALBERT B. ROSENBAUM,
GLEN S. STEPHENS,
Attorneys for Regular Common Carrier Conference of the American Trucking Assns., Inc., et al., Intervening Defendants.

DAVID AXELROD,
Attorney for Central States Motor Freight Bureau, Inc., and Motor Carriers Conference of Illinois, Inc., Intervening Defendants.

MARCH 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 754.

THE EMERY TRANSPORTATION COMPANY, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*

PETITION FOR REHEARING.

This is the petition of The Emery Transportation Company, appellant, for rehearing. Appellant filed, on April 15, 1950, an appeal from the final judgment and decree entered on February 14, 1950, by a specially constituted District Court of three judges, established pursuant to Section 2284 of Title 28 of the United States Code, dismissing it's complaint seeking to set aside an order of the Interstate Commerce Commission. Appellees, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court, filed a motion to affirm the judgment and decree of the aforesaid District Court. Reply was filed thereto by appellant. This Court, on May 15, 1950 granted the motion to affirm.

Appellant, in *The Emery Transportation Company Purchase—Nowak Trucking Co.*, 40 M. C. C. 835 and 45 M. C. C. 805, was authorized by the Interstate Commerce Commission to purchase operating rights authorizing contract carrier services from Chicago, Illinois, to points and places in Wisconsin. In *The Emery Transportation Company—Control and Merger*, 50 M. C. C. 433, appellant was authorized to purchase other contract carrier operating rights authorizing services from Jeffersonville, Indiana, to Chicago, Illinois. In approving the transaction, the Commission specifically permitted the unification of these rights with those already held by appellant, including the rights purchased from Nowak authorizing services from Chicago to points in Wisconsin.

Appellant filed certain rates with the Commission which would have unified these rights by providing through service from Jeffersonville through Chicago to points in Wisconsin. In *Soap, Toilet Articles—The Emery Transportation Company*, Investigation and Suspension Docket No. M-2854 (March 14, 1949 and July 6, 1949), the Commission found the through service to be beyond the scope of appellant's operating authority, and instructed it to discontinue performing such services. Appellant, within the time allowed by statute, filed a complaint in the United States District Court for the Southern District of Ohio, Western Division, requesting that the aforesaid order of the Commission be enjoined and set aside. The lower court issued a final judgment and decree without opinion, dismissing appellant's complaint. Whereupon, appellant took a direct appeal to this Court. Appellees filed a motion to affirm, contending that there was no substantial question involved. Appellees replied thereto.

The sole question raised by appellees' motion and appellant's reply thereto was whether the case before this Court presents any substantial question. Appellant, in its reply, made no effort to argue the actual issues in the case. It simply undertook to convince the Court that there is a substantial question to be decided.

BLEED THROUGH POOR COPY

Appellees contended that the decisions of this Court support the Commission's interpretation of the statute, and for that reason no substantial question is here presented. To sustain this argument, appellees cited three cases, each of which will be considered herein briefly.

In *Noble* v. *United States,* 319 U. S. 88, the Commission had imposed in the permit of Noble a restriction which limited this carrier to serving a certain class of shippers. The sole issue before the Court was whether the Commission could lawfully impose such a restriction. This Court concluded that it could. In the instant case there is no question of a restriction as to shippers who may be served being placed in the permit, for the Commission has not undertaken to impose in the permit any restriction. It would seem, therefore, that the Noble Case, *supra,* has no bearing whatsoever on the instant case.

In *Acme Fast Freight* v. *United States,* 34 F. Supp. 968, appellant, a freight forwarder, had entered into certain joint rate arrangements with common carriers for the purpose of avoiding the regular tariff charges. The issue before the Court was the legality of these arrangements. This Court concluded that these agreements were unlawful because joint rate arrangements could not be entered into between a freight forwarder and a common carrier, for the reason that freight forwarders had always been considered shippers. In the instant case appellant is not asking to enter into joint rates with anyone. It would hardly seem, therefore, that the decision of this Court in the Acme Case, *supra,* would control the issues here involved.

In *United States* v. *Rosenblum Truck Lines, Inc.,* 315 U. S. 50, appellee transported property for other motor carriers and contended that it was entitled to either a certificate or permit under the so-called "grandfather clause" of the Motor Carrier Act, 1935. This Court concluded that Rosenblum was not entitled to either a certificate or permit. In the instant case there is no question raised as to the appellant's right to a permit. It would hardly seem,

therefore, that the Rosenblum case, *supra,* has any bearing on the instant case.

The issue here presented to the Court is whether the Commission, after authorizing appellant to unify two separate operating permits, and after issuing such authority, may later, in a rate case involving the reasonableness of charges, prohibit the unified service previously authorized.

It is respectfully submitted to this Court that this issue has never been decided by it. In fact, we know of no judicial opinion that has ever been handed down on this subject. The matter is of a great deal of importance, not only to appellant, but to the motor carrier industry generally, as evidenced by the fact that several trade associations intervened in the court below. In spite of the importance of this case to the motor carrier industry and to the appellant, and in spite of the fact that counsel for the appellant in arguing the matter before the court below, stated that the action had been brought largely for the purpose of obtaining a judicial opinion, such opinion has never been rendered.

That this case presents a substantial question is clearly shown by the action of this Court in *United States, et al.* v. *Rock Island Motor Transit Co., et al.,* No. 654, and *United States, et al.* v. *Texas & Pacific Motor Transport Co.,* No. 713-14. In the Rock Island Case, No. 654, probable jurisdiction was noted by this Court on March 27, 1950. In the Texas & Pacific Case, No. 713-14, probable jurisdiction was noted by this Court on May 1, 1950.

In both the Rock Island and Texas & Pacific cases, the Interstate Commerce Commission had approved the purchase of operating rights by these carriers without imposing a so-called key-point restriction prohibiting the transportation of property through certain key points. At a later date the Commission amended the certificates by imposing the aforesaid restriction. In both cases the lower courts set aside the Commission's orders because the further limitation imposed in the certificates constituted a substantial change of the operating rights previously

BLEED THROUGH POOR COPY

granted, and since the Commission did not follow the procedure provided for in Section 212, Part II of the Interstate Commerce Act, the orders were in excess of its authority under the Act.

The Interstate Commerce Commission authorized appellant to perform a through service through Chicago when it authorized the unification of the operating rights here in question. The order of the Commission here complained of prohibits through service just as effectively as though the Commission had attempted to write into the permit a key-point restriction. This action was not taken by the Commission pursuant to the provisions of Section 212. It would seem, therefore, that if the Rock Island and Texas & Pacific cases involve substantial questions, the instant case does also; for the Commission is here attempting to do, by indirection, the same thing it attempted to do in those cases by direction; namely, partially revoke operating authority without going through the procedure established by Congress in the Act.

By this petition appellant is not attempting to argue the merits of its appeal. Its sole contention is that there is a substantial question involved. None of the cases cited by appellees has any bearing whatsoever on the issue involved in this case. This issue is not only a novel one to this Court—it is one upon which there has never been a judicial opinion. The real question involved is identically the same as the one involved in both the Texas & Pacific and the Rock Island cases. The only essential difference seems to be, in those cases the Commission's decision was annulled and set aside, and it, therefore, has had to make the appeal; whereas, in the instant case, since the order of the Commission was affirmed, the burden of appealing does not rest upon the Commission. It would appear, therefore, that, since the Court has allowed the Commission's appeal in the Texas & Pacific Case and the Rock Island Motor Transit Co. Case, it should allow the appeal in the instant case.

Petitioner respectfully requests that this Court reconsider its order of May 15, 1950, granting appellees' motion to affirm; and that, upon reconsideration, the motion be denied and probable jurisdiction noted.

Dated May 29, 1950.

CLARENCE D. TODD,
DALE C. DILLON,
944 Washington Bldg.,
Washington 5, D. C.,
Attorneys for Appellant.

TODD, DILLON AND CURTISS,
Of Counsel,
944 Washington Building,
Washington 5, D. C.

Certificate of Service.

I certify that a copy of the foregoing Petition for Rehearing was served on counsel of all parties of record by mail this 29th day of May, 1950.

CLARENCE D. TODD.

MAY 15, 1950.

Per Curiam Decisions.

No. 754. EMERY TRANSPORTATION CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of Ohio; and

No. 755. HOFFMAN ET AL. *v.* O'BRIEN, POLICE COMMISSIONER, ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgments are affirmed. *Clarence D. Todd, Dale C. Dillon* and *Harry Kasfir* for appellant in No. 754. *Julius Hallheimer* for appellants in No. 755. *Solicitor General Perlman, Daniel W. Knowlton, Albert B. Rosenbaum* and *David Axelrod* for appellees in No. 754. *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, and *Samuel A. Hirshowitz*, Assistant Attorney General, for Goldstein; and *John P. McGrath, Frank S. Hogan, Seymour B. Quel* and *Whitman Knapp* for O'Brien et al., appellees in No. 755. Reported below: No. 755, 88 F. Supp. 490.